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20 **UNITED STATES DISTRICT COURT**

21 **NORTHERN DISTRICT OF CALIFORNIA**

22 **SAN FRANCISCO/OAKLAND DIVISION**

23 FACEBOOK, INC., a Delaware
corporation,

24 Plaintiff/Counterclaim
Defendant,

25 v.

26 BRANDTOTAL, LTD., an Israeli
corporation, and
UNIMANIA, INC., a Delaware
corporation,

27 Defendants/Counterclaim
Plaintiffs.

28 Case No.: 3:20-CV-07182-JCS

DEFENDANTS' REPLY IN SUPPORT OF
EX PARTE MOTION FOR TEMPORARY
RESTRANDING ORDER

Judge: The Hon. Joseph C. Spero
Ctrm.: Courtroom F – 15th Floor
Date: October 26, 2020
Time: 2:00 PM

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1 **INTRODUCTION**

2 Facebook does not deny it runs a competitive business, using deidentified data regarding
 3 aggregated user demographics and advertising interests (herein “Advertising Data”) to advise
 4 companies how to spend advertising dollars on Facebook. If user privacy interests are in
 5 jeopardy, then Facebook is no less guilty in running its competitive service. *hiQ Labs, Inc. v.*
 6 *LinkedIn Corp.*, 938 F.3d 985, 998 (2019) (“Further, there is evidence that LinkedIn has itself
 7 developed a data analytics tool similar to hiQ’s products, undermining LinkedIn’s claim that it
 8 has its members’ privacy interests in mind”).

9 Never once does Facebook identify any specific harm¹ to privacy interests or otherwise
 10 that anyone has experienced as a result of BrandTotal’s UpVoice service that uses deidentified
 11 Advertising Data to advise companies how to spend money with Facebook and other prominent
 12 social media sites. Despite years of being in business, Facebook cannot cite any UpVoice user
 13 complaint, nor a complaint from any company that advertises on Facebook involving
 14 BrandTotal’s Advertising Data. Never once does Facebook deny the harsh findings made by
 15 Congress just days after it filed the original state court action – findings that it is a monopolist
 16 that stamps out competition and detriments users -- keeping in mind the current procedural
 17 posture that only requires BrandTotal to raise “serious questions” about its defenses. Perhaps
 18 most ironic is that Facebook uses its own deceitful conduct, as found by the FTC in connection
 19 with the Cambridge Analytica scandal, as a reason why it can now stop all competition in data
 20 analytics on its site. Its own conduct cannot become its excuse to monopolize. Its nearly 3
 21 billion user platform is larger than most countries in the world, and it should not be permitted to
 22 leverage this position to monopolize and control data it does not own – by its terms of service it
 23 is a mere non-exclusive licensee. Facebook admits that BrandTotal secures user consent.
 24 Facebook’s Opposition (“Opp. Br.”) at 6-7; Dor Decl., ¶¶ 15-22. Of course, once a user
 25 volunteers to share this non-sensitive Advertising Data on a non-confidential basis, it is public
 26 information. Everyone has the right to decide what information about its life is public and what

27
 28 ¹ Facebook’s gripes do not relate to any harm to it or users, but are instead directed to concepts as
 foolish as BrandTotal tracking consumer likes and sad faces. Opp. Br. at 7.

1 is not.

2 This case has far larger implications than just the dispute between Facebook and
 3 BrandTotal. A ruling against BrandTotal allows Facebook to stamp out competitors (hurting
 4 them), thereby limiting options for consulting services for companies worldwide that wish to
 5 advertise in social media (hurting them), and precluding users from making choices about the
 6 data they own, including the option to get paid for it (hurting them). The Ninth Circuit
 7 recognized this societal dilemma, stating that “[i]f companies like LinkedIn, whose servers hold
 8 vast amounts of public data, are permitted selectively to ban only potential competitors from
 9 accessing and using that otherwise public data, the result—complete exclusion of the original
 10 innovator in aggregating and analyzing the public information—may well be considered unfair
 11 competition under California law.” *hiQ Labs*, 938 F.3d at 998.

12 The type of conduct involved in this case is age old and beneficial to companies needing
 13 advertising consulting services. In the older days, by way of just one example, a “people meter”
 14 was placed in a home on a TV and it monitored the family’s viewing behavior. Telscher Decl.,
 15 ¶ 2; Ex. W. But, according to Facebook’s interpretation of “automated means,” any practical
 16 means of similarly tracking advertising interactions in the modern era on its site is precluded. A
 17 user with a camera set up to record the computer screen while the user surfs the Facebook site
 18 (“automated means”) would be precluded, as would many other innovations that third parties
 19 develop to collect and analyze deidentified data on these social media sites. BrandTotal raised in
 20 its opening brief, and Facebook does not deny, that the limits of its argument have no bounds –
 21 well beyond this case – to preclude use of automated means to collect data with user consent for
 22 any purpose. Per Facebook’s position, the only allowed way to collect data from its site is by
 23 pencil and paper. Of course, if “manual” collection, as opposed to “automated,” is not precluded
 24 by Facebook’s Terms of Service, as it concedes, then what interest is it really protecting? It’s
 25 simply foreclosing the only feasible means to gather and analyze data for anyone but itself.

26 Finally, as again in *LinkedIn*, when a large social media company shuts off the lifeblood
 27 – data flow – to a company like BrandTotal, it cannot possibly run its business. The irreparable
 28 harm is serious, irreversible, and imminent. Because Facebook runs a competitive advertising

1 service, and demands users to allow it to use the same types of Advertising Data, it knows this.
 2 Given the serious harm in play, BrandTotal, per *LinkedIn*, need only show “serious questions”
 3 regarding the merits. On this record, it has made this showing. BrandTotal collected
 4 Advertising Data through UpVoice without incident long before this case, and with Facebook’s
 5 knowledge and approval. There is no serious risk of harm in allowing it to continue to do so now
 6 while the case is pending.²

ARGUMENT

I. THE IMMINENT COLLAPSE OF A LEGITIMATE BUSINESS IS IRREPARABLE HARM.

A. The Requested Relief Is Specifically Tailored to Remedy the Harm Caused by Facebook’s Actions.

11 In the State Court action filed on October 1, 2020 (but removed from the allegations of
 12 the Federal complaint), Facebook alleged:

13 **H. Facebook’s Enforcement Efforts**

14 56. In September 2020, Facebook took various technical enforcement measures against
 15 Defendants, including disabling Facebook and Instagram accounts and Pages. Facebook also made
 16 multiple requests to Google to remove and disable the extensions from the Chrome Store, but Google
 has not yet done so.

17 Ex. F (ECF No. 27-06). These actions were taken without BrandTotal’s knowledge, and just
 18 before Facebook filed the state court action. Leibovich Decl., ¶ 21. Immediately after Facebook
 19 filed the action, Google took down BrandTotal’s UpVoice extension. *Id.* ¶ 24. This was not
 20 coincidence. The UpVoice extension had been on the Google Chrome Store since at least June
 21 2019, and at no time prior to Facebook’s actions had Google communicated any concern about it

22

23 ² Facebook raises in passing several undeveloped or irrelevant arguments. Without any legal
 24 analysis contends that collecting advertising information about ads is somehow copyright
 25 infringement. Opp. Br. at n.4. It is, of course, fair use to make copies of ads in the market for
 26 analysis and advice to customers. In the old days, an ad agency would have photocopied ads
 27 from publications or videotaped competitor ads. BrandTotal does not publicly display ads in
 28 violation of copyright law. Facebook also discusses alleged actions by BrandTotal since
 Facebook had BrandTotal’s accounts terminated and business effectively shut down, which
 allegations are incorrect in what happened, but more importantly it fails to explain how
 BrandTotal is bound by Facebook’s terms of service after Facebook terminated (*hiQ Labs*, 938
 F.3d at 998 (“[f]inally, LinkedIn has not explained how it can enforce its user agreement against
 hiQ now that its user status has been terminated”). See Supp. Dor. Decl., ¶¶ 11, 13-17.

1 to BrandTotal. Supp. Leibovich Decl., ¶ 3. Nor has Facebook cited to any evidence that
 2 BrandTotal is in violation of any other Google terms of service provision.

3 It is the above actions of *Facebook*, that precipitated the harm, and these same actions
 4 that BrandTotal requests that this Court order Facebook to undo. While Facebook cannot directly
 5 “turn a switch” and have the UpVoice extension re-activated, its opposition to third-party Google
 6 turning the switch, guarantees BrandTotal cannot achieve that result.³ As Facebook
 7 acknowledges, (Opp. Br. at 4), Google’s terms of service allow it to terminate a user (like
 8 BrandTotal) for violating a third party’s terms of service (as Facebook has alleged and told
 9 Google). Until Facebook is ordered to rescind its take down request, the browser extension will
 10 remain disabled, and BrandTotal will be unable to run its business.⁴

11 This is wholly distinguishable from the one case Facebook cites on this topic. Opp. Br. at
 12 9 (citing *Sierra Club v. U.S. Dep’t of Energy*, 825 F. Supp. 2d 142 (D.D.C. 2011). In *Sierra*
 13 *Club*, an environmental group sought to enjoin government funding to a power company,
 14 claiming injury to the members as a result of the anticipated operation of a partially-built coal
 15 power plant. *Sierra Club*, 825 F. Supp. 2d at 149-150. There was affidavit evidence from the
 16 power plant, that given the advanced state of build, the company would proceed with the project
 17 regardless of government funding, and the harm to the Sierra Club members was so far removed
 18 that the court questioned the group’s standing. *Id.* at 151. This is plainly not the situation here.
 19 Facebook’s actions here were targeted against BrandTotal and designed to prompt Google’s
 20 takedown the UpVoice extension. Its reinstatement of BrandTotal on Facebook and rescission of
 21 its takedown request to Google (the relief sought by this TRO) is highly likely to remedy the
 22 harm caused. This is all that is required to establish redressability. See *Nat’l Parks*
 23 *Conservation Ass’n v. Manson*, 414 F.3d 1, 7 (D.C. Cir. 2005) (“A significant increase in the

24 ³ Facebook concedes that to place an ad on its site, a company must have a Facebook
 25 account. BrandTotal requests that its account be reinstated. Facebook has already approved ads
 26 for UpVoice on its site. If Facebook refuses in view of this TRO to place ads that comply with
 27 its own advertising requirements, BrandTotal will consider further legal action. It would be our
 28 expectation that Facebook is not making such a threat.

⁴ While it is possible that BrandTotal will have to take legal action involving Google, there is no
 reason to expect that to be necessary. Should the Court grant the TRO, and Facebook rescinds its
 take down request, BrandTotal anticipates Google will comply with the import of this Court’s
 order and reinstate the extension.

1 likelihood that the plaintiff would obtain relief that directly redresses the injury suffered”
 2 suffices to show standing to seek the relief sought) (*quoting Utah v. Evans*, 536 U.S. 452, 464
 3 (2002)).

4 Facebook also complains that the relief sought is not “specific” and “precise” so that
 5 Facebook has notice of precisely what the injunction would require. Opp. Br. at 10. This is
 6 disingenuous at best. Facebook knows what actions it took to disable UpVoice. It alleged as
 7 much in the State Court complaint as noted above.⁵ BrandTotal’s requested TRO seeks to undo
 8 these actions as it relates solely to UpVoice. “Injunctions are not set aside under Rule 65(d) ...
 9 unless they are so vague that they have no reasonably specific meaning.” *See Portland Feminist*
 10 *Women’s Health Ctr. v. Advocates for Life, Inc.*, 859 F.2d 681, 685 (9th Cir. 1988) (*quoting*
 11 *United States v. Holtzman*, 762 F.2d 720, 726 (9th Cir. 1985)). That is plainly not the case here.
 12 Facebook understands precisely what BrandTotal seeks; namely the rescission of the steps it took
 13 to disable it.⁶

14 **B. Without Relief, BrandTotal Faces Employee Lay-Offs, Customer Loss and
 15 Financial Ruin.**

16 Facebook contends BrandTotal’s evidence of irreparable harm is insufficient or
 17 speculative, but its analysis myopically focuses on certain elements of harm to the exclusion of
 18 the broader picture. Opp. Br. at 10-12. The bottom line is that access to user data on Facebook is
 19 essential for BrandTotal’s product offering. Leibovich Decl., ¶ 30. Without it, BrandTotal cannot
 20 provide the promised advertising analytics to customers. *Id.* To be clear, if the TRO is denied,
 21 BrandTotal will notify its customers, and it will no longer receive the monthly fees paid by
 22 existing customers. Supp. Leibovich Decl., ¶ 5. This is not a loss of one or two customers
 23 (though BrandTotal has already lost one customer, *see* Supp. Leibovich Decl., ¶ 6, plus several
 24 new customer opportunities, Leibovich Decl., ¶¶ 30-35), this is loss of *every* customer, and *every*
 25 potential new customer, and all goodwill. This is irreparable harm. *hiQ Labs, Inc. v. LinkedIn*
 26 *Corp.*, 273 F. Supp. 3d 1099, 1106 (N.D. Cal. 2017), *aff’d and remanded*, 938 F.3d 985 (9th Cir.
 27

28 ⁵ Facebook alone knows what it said to Google. BrandTotal has never seen its communications.

⁶ BrandTotal disagrees that the words “reasonable actions” in communicating with Google is ambiguous in this context, but welcomes further specificity if the Court believes it necessary.

1 2019) (“[e]vidence of threatened loss of prospective customers or goodwill certainly supports a
 2 finding of the possibility of irreparable harm”) (*quoting Stuhlbarg Int’l Sales Co., Inc. v. John D.*
 3 *Brush & Co., Inc.*, 240 F.3d 832, 841 (9th Cir. 2001)). Moreover, without data, BrandTotal
 4 cannot compile analytics, and as stated in the original declaration of Alon Leibovich, if the TRO
 5 is denied it will *immediately* be forced to lay-off employees. Leibovich Decl. ¶ 56.

6 Facebook faults BrandTotal for not providing a date certain for when it would go out of
 7 business, noting that BrandTotal previously completed a round of venture capital funding. Opp.
 8 Br. at 11. But the law does not require a company to exhaust every drop of investor money
 9 before establishing irreparable harm. *See Rent-A-Ctr., Inc. v. Canyon Television & Appliance*
 10 *Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (injury to goodwill and ongoing marketing efforts
 11 established irreparable harm); *Stuhlbarg Int’l Sales Co., Inc. v. John D. Brush and Co., Inc.*, 240
 12 F.3d 832, 841 (9th Cir. 2001) (loss of goodwill resulting from failure to fill customer orders
 13 would result in irreparable harm); *Drakes Bay Oyster Co. v. Salazar*, 921 F. Supp. 2d 972, 994
 14 (N.D. Cal.), *aff’d sub nom. Drakes Bay Oyster Co. v. Jewell*, 729 F.3d 967 (9th Cir. 2013), and
 15 *aff’d sub nom. Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073 (9th Cir. 2014). Just “[t]he threat
 16 of being driven out of business is sufficient to establish irreparable harm.” *American Passage*
 17 *Media Corp. v. Cass Communications, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985). As in many
 18 small start-up companies, in BrandTotal the investors have considerable input into the strategic
 19 direction of the company and, in BrandTotal, they form most of the board of directors. Supp.
 20 Leibovich Decl. ¶ 9. BrandTotal’s board of directors will ultimately determine when to shutter
 21 the business, but with no revenue coming in and no way to continue offering a product, as
 22 averred by Mr. Leibovich, that time will not be long in coming. Leibovich Decl. ¶ 62.

23 Facebook cites the *Stackla* case, which similarly involved a company accessing data on
 24 Facebook’s platform and which, *on the facts of that case*, found no irreparable harm. Opp. Br. at
 25 11 (citing *Stackla, Inc. v. Facebook Inc.*, No. 19-CV-05849-PJH, 2019 WL 4738288, at *4 (N.D.
 26 Cal. Sept. 27, 2019)). Importantly, there the court noted that “Stackla does not identify a single
 27 client that it will imminently lose (or even an exemplary client it has already lost).” *Stackla*, at
 28 *4. The same was true of prospective clients. According to the court, Stackla did not “identif[y]

1 prospective customers who have withdrawn from ongoing sales activities.” *Id.* The Court was
 2 unconvinced that Stackla’s business was in jeopardy, at least before a preliminary injunction
 3 hearing could be held, and interestingly, Stackla appears to still be going strong following a
 4 settlement with Facebook, suggesting that Facebook allowed the use to ultimately continue. *See*
 5 <https://stackla.com/>.

6 Here, in contrast, BrandTotal has provided names of customers and potential customers,
 7 as well as supporting documentation, showing that they have either expressed concerns or
 8 terminated contracts or further discussions. Leibovich Decl. ¶¶ 30-43; Supp. Leibovich Decl. ¶ 6.
 9 Whatever the situation with *Stackla* may have been, BrandTotal is literally hanging on by its
 10 fingertips for the Court’s decision in this TRO motion. There is specific and detailed ongoing
 11 and irreparable harm if this TRO does not issue. This is precisely what the Ninth Circuit
 12 affirmed under circumstances near identical to this case. *hiQ Labs*, 938 F.3d at 998.

13 **C. BrandTotal Acted Promptly to Secure Judicial Relief.**

14 Facebook argues that the timing of BrandTotal’s TRO request somehow undercuts its
 15 request for emergency relief. Opp. Br. at 12-13. But the opposite is true. On October 1, 2020,
 16 the lifeblood of BrandTotal’s business, the UpVoice extension, was unexpectedly shut down by
 17 Facebook’s anticompetitive and tortious actions. Since then, BrandTotal has scrambled.
 18 Facebook gave BrandTotal no warning of these actions, and unlike Facebook, BrandTotal did
 19 not have a team of lawyers standing by ready redress complex legal allegations. Indeed, being a
 20 small start-up company, BrandTotal had to marshal limited resources to assess the situation, find
 21 counsel, get its counsel up to speed, and prepare a TRO motion with supporting declarations
 22 against a behemoth that Congress found “ha[s] exploited, entrenched, and expanded [its] power
 23 over digital markets in anticompetitive and abusive ways.” Ex. K, Report, p. 6.

24 As described in BrandTotal’s Response to the request for scheduling (ECF No. 29),
 25 BrandTotal hoped to resolve the matter promptly and amicably with Facebook. After convincing
 26 BrandTotal to delay filing a TRO, Facebook, however, came to the conference with no
 27 settlement authority. ECF No. 29. Instead, it dismissed the state court action only to file this
 28 action in its apparent preferred venue for TRO and preliminary injunction proceedings. ECF No.

1 29. Realizing that Facebook was not interested in settlement, BrandTotal filed its motion for a
 2 TRO less than 48 hours after learning of Facebook's Federal Complaint. BrandTotal reacted as
 3 quickly as it could given that Facebook added new counts, again with no warning. There was no
 4 delay and certainly not one that warrants denial of the requested TRO. *See, e.g., GenoSource,*
 5 *LLC v. Inguran, LLC*, 373 F. Supp. 3d 1212, 1226 (N.D. Iowa 2018) (finding delay of 21 days
 6 did not preclude granting TRO). The TRO is timely.

7 **II. BRANDTOTAL HAS PRESENTED A SERIOUS QUESTION ON THE MERITS.**

8 **A. BrandTotal Has Presented A Serious Question as to the Merits of Facebook's** 9 **Breach of Contract Claim Either Because the Contract Is Not Violated or the** **Contract as Construed is Unenforceable.**

10 Facebook claims that BrandTotal overlooked two provisions of the Facebook Terms of
 11 Service alleged to have been violated (1) Section 3.2.1 precluding misleading or fraudulent
 12 behavior, (2) Section 3.2.2 directed to impairing the appearance/working of a Facebook product.
 13 But BrandTotal did not overlook the allegations. As set forth in the opening memorandum,
 14 nothing BrandTotal does is misleading or fraudulent—it has user consent—and the extension
 15 does not alter or impair Facebook. Leibovich Decl. ¶ 10; Supp. Dor Decl. ¶¶ 6-12. Facebook
 16 only claims otherwise by characterizing what UpVoice does in colorful language designed to
 17 make it seem nefarious.⁷ For example, Facebook contends BrandTotal is "masquerading as an
 18 authenticated Facebook user with legitimate login credentials." Opp. Br. at 7. In fact, BrandTotal
 19 is giving users a way to monetize their own data by *voluntarily* and *deliberately* signing up for
 20 UpVoice and installing a browser extension that allows the user to share their Facebook
 21 experience with BrandTotal. Dor Decl. ¶¶ 7-14. There is nothing fraudulent about this, nor does
 22 it interfere or harm the Facebook platform. Dor Decl. ¶ 22. Thus, as stated in the opening brief,
 23 the only even *plausible* contract provision surrounds "automated means."

24 ⁷ Facebook makes a passing reference to alleged misleading conduct (the language of its terms of
 25 service) but fails to mention that Facebook has procedures for approving ads, and never
 26 complained, prior to this lawsuit, that BrandTotal's use of "participating sites" was
 27 misleading. While BrandTotal does not agree that the language is misleading, in part because it
 28 was approved by Facebook, it has also published other UpVoice ads that do not mention
 Facebook. Supp. Dor. Decl., ¶¶ 21-24. BrandTotal has already told Facebook that it will not use
 "participating sites" during any grant of preliminary relief to moot this minor dispute, and will so
 represent on the record.

1 As to this contract provision, Facebook has little to say. They do not address the 2017
 2 Terms of Service that imply “automated means” connotes something different than what is
 3 occurring here. Instead, they effectively concede that they interpret “automated means” to be any
 4 computer-based data collection for any purpose whatsoever. Facebook does not contest that there
 5 would be no other practical way to collect data with this broad a reading of “automated.” Even
 6 emailing handwritten notes is in a way “automated.” And Facebook does not deny that they offer
 7 a competitive service using the same sort of “automated means” they contend others cannot use.
 8 Collectively, these facts show that Facebook’s contractual restrictions on data collection with
 9 “automated means” are not about protecting user privacy, but instead all about monopolizing the
 10 data and hindering competition. Under these facts the restrictions are unenforceable as a matter
 11 public policy.

12 In effect, Facebook’s Terms of Service places Facebook in a position of gatekeeper as to
 13 how users may monetize their own data and who can access user data. Congress recognized
 14 Facebook’s unrestrained power in its recent report. *See ECF No. 27-1 (“Defs’ Memo”)* at 6-7
 15 (summarizing the October 2020 Judiciary Subcommittee Report’s findings). Facebook does not
 16 substantively address or even contest BrandTotal’s arguments that Facebook’s Terms of Service
 17 (1) interfere with users’ choices about how users use their information and (2) inhibit
 18 competition.

19 Instead, Facebook’s narrow focus on the language of Section 3.2.3 as only concerning
 20 “unauthorized collection of data by third parties,” Opp. Br. at 20, ignores the fundamental issues
 21 underlying the public interest reasons for why these contractual provisions are unenforceable.
 22 Namely, user data belongs to users (and not Facebook)⁸ and Facebook’s Terms of Service
 23 impermissibly hinders the free flow of information and stifles competition in data analytics. A
 24 substantial body of law has developed from longstanding Supreme Court precedent that has
 25 found such “private” contractual provisions unenforceable. *See* Defs’ Memo at 11-12.

26 Here, Facebook has erected contractual barriers around access to and the use of certain

27 ⁸ Facebook not only agrees with BrandTotal that individual users may freely collect the data that
 28 BrandTotal collects, Facebook contends it “affirmatively enables each user to download their
 information and take it to another platform.” Opp. Br. at 19.

1 user information – information that is in the public domain and information that Facebook has no
 2 right to claim as its own. *See id.* at 12-14. Facebook does not even attempt to suggest it has not
 3 done so.⁹

4 **B. BrandTotal Has Raised a Serious Question as to Whether Facebook Will Prevail
 5 on the CFAA and Section 502(c) Claims.**

6 The CFAA is a criminal hacking statute that dates from the 1980s. It was designed to
 7 target criminal hackers who might break and enter into computer systems, particularly the critical
 8 infrastructure of the United States Government. The CFAA’s civil liability provisions at issue
 9 here track the criminal prohibition. As a result, the Ninth Circuit has explained that the rule of
 10 lenity mandates requires that it be “construed strictly” against those, like Facebook here, who
 11 assert it in civil cases. See *U.S. v. Nosal*, 676 F.3d 854 (9th Cir. 2012) (“*Nosal I*”). It is thus
 12 essential for this court to read the CFAA narrowly so that it does not “turn a criminal hacking
 13 statute into a ‘sweeping Internet-policing mandate.’” *LinkedIn*, 938 F.3d at 1003 (quoting *Nosal*
 14 *I*, 676 F.3d at 858). As the Ninth Circuit explained further in *Nosal I*, “If there is any doubt about
 15 whether Congress intended [the CFAA] to prohibit the conduct in which [Defendant] engaged,
 16 then we must choose the interpretation least likely to impose penalties unintended by Congress.”
 17 676 F.3d at 863.

18 The relevant provision of the CFAA asserted by Facebook in this case prohibits a person
 19 from “intentionally access[ing] a computer without authorization or exceeds authorized access,
 20 and thereby obtain[ing] … information from any protected computer.” 18 U.S.C. § 1030(a)(2).
 21 Under the required strict construction of the CFAA, the Ninth Circuit has repeatedly held that
 22 violations of the Terms of Service of a social network cannot fall within the CFAA’s prohibition
 23 on accessing of a computer in a way that “exceeds authorized access.” See, e.g., *LinkedIn*, 938
 24 F.3d at 1000-01; *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1067 (9th Cir. 2016)
 25 (“[A] violation of the terms of use of a website—without more—cannot establish liability under
 26 the CFAA.”); *Nosal I*, 676 F.3d at 862. See also *U.S. v. Drew* 259 F.R.D. 449 (C.D. Cal. 2009)

27 ⁹ Facebook contends that BrandTotal concedes that all elements accept breach are met. Opp. Br.
 28 at 18. Facebook has not shown any real damage, but to be clear BrandTotal does not concede
 these points, it merely does not rely on them as a defense at the TRO stage.

1 (imposing criminal liability based upon social network Terms of Service violation is void for
 2 vagueness). No doubt realizing that this avenue has been foreclosed, Facebook argues that
 3 Defendants intentionally accessed a computer without authorization after Facebook filed its state
 4 court action against Defendants. Complaint ¶ 84.

5 In *LinkedIn*, the Ninth Circuit noted that “the CFAA contemplates the existence of three
 6 kinds of computer information that can be “accessed without authorization”: “(1) information for
 7 which access is open to the general public and permission is not required, (2) information for
 8 which authorization is required and has been given, and (3) information for which authorization
 9 is required but has not been given[.]” 938 F.3d 1001-02. Category One and Two cases fall
 10 outside the statute, while Category Three cases can fall within in as analogous to the kind of
 11 “breaking and entering” Congress tried to prevent in passing the CFAA. See *id.* at 1002.
 12 *LinkedIn* involved a Category One case, the accessing of public LinkedIn profiles, while
 13 Facebook proffers a Category Three case, *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058
 14 (9th Cir. 2016). *Power Ventures* involved a company that allowed consumers to display their
 15 social network updates from a variety of platforms. In order to do this, it obtained consumers’
 16 user IDs and passwords from Facebook and other sites, logged into the social networks, extracted
 17 data, and then displayed it for the consumers on its own site. Facebook banned Power Ventures
 18 from accessing its site using its customers’ passwords, and there was direct evidence that the
 19 company conceded that it used Facebook’s systems and that use was unauthorized. See *id.* at
 20 1068. The Ninth Circuit thus concluded that this constituted “access[ing] without authorization”
 21 within the strict meaning of the CFAA.

22 The present case is vastly different from *Power Ventures*. In *Power Ventures*, the
 23 defendant was a bad actor. It never attempted to work with Facebook, it rejected Facebook’s
 24 efforts to discuss a business deal, it invited a lawsuit for publicity reasons, it had software that
 25 involved automated messages going to users from Facebook, it secured friend leads from users
 26 and contacted them directly to expand its business. *Power Ventures*, 844 F.3d at 1062-63.

27 The present case is simply not a Category Three case like *Power Ventures*. Unlike the
 28 company in that case, BrandTotal does not “access” Facebook by logging in as someone else,

1 pull personal data out, and then display it elsewhere. It does not send out messages through
 2 Facebook, nor does it collect “friend” information to try to solicit them to become its customers.
 3 Instead, like the defendant in *LinkedIn*, BrandTotal does not violate the CFAA’s “accesses
 4 without authorization” restriction. It merely (and contrary to Facebook’s false and misleading
 5 assertions) provides a browser extension that tracks an Internet user’s web-surfing – with their
 6 informed consent and in return for financial compensation. Further, unlike the company in
 7 *Power Ventures*, BrandTotal does not impersonate a Facebook user and does not log into
 8 Facebook using any Facebook user’s credentials, nor does it extract personally identified
 9 information. Indeed, BrandTotal *cannot* do any of these things because it never obtains Facebook
 10 passwords or user IDs. *See, e.g.*, Supp. Dor Decl. ¶10. The entire anti-criminal hacking model of
 11 the CFAA is thus wholly inapposite. Rather than anything like unauthorized access of Facebook,
 12 BrandTotal merely studies its own customers with their full consent, just as if it were a
 13 marketing research scientist or a Nielsen ratings box sitting next to them at their computer (yet
 14 with no idea who they actually are). This, like the public profiles in *LinkedIn*, involves activity
 15 that BrandTotal has every right to engage in, and involves no illegal access of anything. It is a
 16 world away from the kind of “breaking and entering” envisioned by the CFAA and cannot form
 17 the basis for liability under it. *See LinkedIn*, 938 F.3d at 1002.

18 For similar reasons, BrandTotal does not violate California’s analogue to the CFAA,
 19 Calif. Penal Code § 502(c). Nor is there any knowing intent to defraud as required by subsection
 20 (a)(4) of the CFAA.¹⁰ And of course, even Facebook’s case on any of these criminal law-based
 21 claims were significantly stronger, the rule of lenity would still apply to restrict liability to the
 22 kinds of clear violations that are simply not present in this case under any reasonable
 23 interpretation of Facebook’s allegations.

24 **C. BrandTotal Is Likely to Prevail on Its Counterclaims.**

25 BrandTotal is likely to succeed on its counterclaims. For its first set of counterclaims—

26 ¹⁰ Facebook alleges that BrandTotal “barely” addresses its claim for intentional
 27 interference. Opp. Br. at 23. However, BrandTotal does not “intentionally interfere” with
 28 Facebook users’ contracts with Facebook at least for the same reasons that it does not breach
 Facebook’s terms, as argued throughout BrandTotal’s briefs.

1 intentional inference with contract and intentional interference with a prospective economic
 2 advantage—Facebook argues that it should prevail because it did not have *specific knowledge* of
 3 BrandTotal’s valid customer contracts or economic relationships. Opp. Br. at 13. But specific
 4 knowledge is not the standard. Indeed, “[w]hen the defendant performs the act that causes the
 5 interference, the defendant need not know exactly who is a party to the contract, so long as he
 6 knows he is interfering with a contractual relationship.” *Altera Corp. v. Clear Logic Inc.*, 424
 7 F.3d 1079, 1092 (9th Cir. 2005); *see also Ramona Manor Convalescent Hospital v. Care*
 8 *Enterprises*, 177 Cal. App. 3d 1120, 1133 (Ct. App. 1986) (finding the same regarding both
 9 interference with contract and prospective economic advantage claims). Here, Facebook cannot
 10 dispute that it had knowledge of BrandTotal’s data analytics business, including its valid
 11 customer contracts and relationships with investors. *See, e.g.*, ECF No. 1 at Ex. 7 (citing to press
 12 release announcing funding for BrandTotal’s data analytics business). Therefore, BrandTotal has
 13 alleged that Facebook had knowledge of BrandTotal’s contracts and economic relationships.

14 The rest of Facebook’s arguments related to BrandTotal’s intentional interference claims
 15 similarly fail. For example, there has been an “actual breach or disruption” of BrandTotal’s
 16 contracts and relationships, as well as “economic harm . . . proximately caused by” Facebook, as
 17 discussed throughout the irreparable harm sections of this brief and BrandTotal’s opening brief.
 18 *See* Def’s Memo at §§ E, II; *see also supra* § I. Also, as discussed in relation to Facebook’s
 19 breach of contract claim, there is no “legitimate business purpose” in Facebook allegedly
 20 enforcing its Terms of Service, which are squarely against public policy. *See supra* § II.A.
 21 Along the same lines, Facebook cannot argue that it is “protecting its users” from UpVoice while
 22 it cannot dispute that every UpVoice user explicitly consents to the information which UpVoice
 23 collects. *See* Supp. Dor. Decl., ¶¶ 6-10. Thus, BrandTotal is likely to prevail on its intentional
 24 interference with contract and prospective economic advantage claims.

25 BrandTotal is also likely to succeed in its claims under each prong—“unlawful,” “unfair,”
 26 and “fraudulent”—of the UCL. For the “unlawful” prong, as discussed above, BrandTotal is likely
 27 to prevail on its intentional interference claims—unlawful violations of the UCL. BrandTotal is
 28 also likely to prevail on the “unfair” prong because, as discussed throughout BrandTotal’s briefs,

1 Facebook has at a minimum violated the spirit of the antitrust laws by excluding a competitor in
 2 the data analytics market, *i.e.*, BrandTotal, from accessing UpVoice users' data, for which
 3 BrandTotal had consent. *See* Def's Memo at § C; *hiQ Labs*, 273 F.Supp.3d at 1118 (finding
 4 "serious question" of UCL violation were defendant was a "dominant power in the market of
 5 professional networking" and "wanted exclusive control over ... data for its own business
 6 purposes"). Finally, BrandTotal has also shown that it is likely to succeed under the "fraudulent"
 7 prong because, per Facebook's terms, the Facebook users own their own data, not Facebook. *See*
 8 ECF No. 26 § I.A.2. When using UpVoice, a user is simply granting BrandTotal access to data
 9 that the user believes to own. *Id.* Facebook's removal of that access is against its own terms and
 10 fraudulent. Thus, BrandTotal is likely to succeed under all three prongs of the UCL.

11 **III. THE BALANCE OF EQUITIES FAVORS GRANTING THE TRO**

12 The only "harm" to Facebook that Facebook can identify is that issuing an injunction
 13 "would force Facebook to allow a non-complaint developer back on its platform, and interfere with
 14 Facebook's ability to enforce its terms and policies and secure its platform." Opp. Br. at 23. But if
 15 the Court issues a TRO, it will have already concluded that there is a serious question as to
 16 whether Facebook may enforce its contract of adhesion in the manner it is doing. It is not a
 17 cognizable harm that Facebook will not get to enforce the very Terms of Service that BrandTotal
 18 contends are unenforceable under CCPA and designed to inhibit competition and the free flow of
 19 information.

20 Beyond the only argument Facebook offers is that BrandTotal is an actor with unclean
 21 hands because it chose to violate Facebook's Terms of Service. Opp. Br. at 23. BrandTotal cites
 22 *Power Ventures* as support this this proposition, ignoring the egregious facts of that case including
 23 serious discovery misconduct, but even so, the recent Congressional Report cast the equities in a
 24 new light. There is a growing understanding of the power that companies like Facebook wield, and
 25 how that can be used to the detriment of both users and competitors, and companies looking for
 26 alternatives for advertising consulting services. Balanced against the manifest harm to BrandTotal
 27 in denying an injunction, the equation is not even close. The harm to BrandTotal far outweighs any
 28 harm to Facebook. *LinkedIn*, 938 F.3d at 994-95.

1 **IV. THERE ARE STRONG PUBLIC INTERESTS IN FAVOR OF GRANTING TRO**

2 In what is perhaps the most ironic statement of Facebook’s entire opposition, Facebook
 3 contends “[t]he public interest is better served by permitting Facebook to take all necessary steps
 4 to protect user privacy.” Opp. Br. at 24. Facebook says this on the heels of a scathing
 5 Congressional Report and after being fined millions in the Cambridge Analytica scandal. If anyone
 6 should be the arbiter of privacy, it is not Facebook. But, then, this case is not about privacy.
 7 Facebook uses the data in exactly the same way (without compensation to users) and allows
 8 affiliates to do so too. *See* Telscher Decl., ¶ 3, Ex. X. Facebook just wants to control access,
 9 thereby controlling competition. But the data is either public or does not belong to Facebook. As
 10 found in *hiQ v. LinkedIn*, allowing a social media platform to monopolize access to data is not in
 11 the public’s interest. *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 1005 (9th Cir. 2019) (“We
 12 agree with the district court that giving companies like LinkedIn free rein to decide, on any basis,
 13 who can collect and use data—data that the companies do not own, that they otherwise make
 14 publicly available to viewers, and that the companies themselves collect and use—risks the
 15 possible creation of information monopolies that would disserve the public interest”). Here,
 16 BrandTotal has permission from the users, no different than someone letting a company monitor
 17 their TV watching to see what commercials they see. This does not jeopardize the “integrity” of
 18 the Facebook platform; it jeopardizes only Facebook’s monopoly power over data it does not
 19 rightfully control. The public and the public interest favors this TRO. Supp. Leibovich Decl., ¶¶
 20 10-11.

21 **CONCLUSION**

22 For the foregoing reasons and as requested in its Opening Brief, BrandTotal respectfully
 23 requests that the Court GRANT its motion for a temporary restraining order.
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1 Date: October 22, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 2020, I caused the foregoing to be filed electronically with the Clerk of Court and to be served via the Court's Electronic Filing System upon all counsel of record, and to be served via email on all counsel of record at the following:

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